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No. 93

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1929.

ANITA H. COOPER, *Petitioner*

*v.*

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

## BRIEF FOR THE PETITIONER.

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## BRIEF FOR THE PETITIONER.

### Opinion of the Court Below.

There was no written opinion of the Court of Claims. See page 13 of the Record.

### Jurisdiction.

The judgment to be reviewed was entered by the Court of Claims on May 6, 1929, (R., 13). A petition for certiorari was filed May 17, 1929, (R., 13). It was granted by this court on October 14, 1929, (50 Sup. Ct. Rep. 16) under Section 3 (b) of the Act of February 13, 1925, (c. 229, 43 Stat. 936, 939).

## Statement of the Case.

This suit was to recover income taxes for the year 1921, alleged to have been erroneously and illegally collected and a claim for refund of which had been denied. The findings of the Court of Claims show that the petitioner, a citizen of the United States and a resident of New York, duly filed her income tax return for the calendar year 1921, and paid the tax shown thereon to be due. In the taxable income reported on the return there was included the sum of $36,670, as a gain derived from the sale on November 7, 1921, of 380 shares of the capital stock of New York County National Bank. At the time the stock was acquired by the petitioner its fair market value was $210 per share. The petitioner's husband had purchased the stock in 1918 at a cost of $113.50 per share. These 380 shares of stock were received by the petitioner on November 1, 1921, by gift from her husband. The stock was sold by the petitioner at a price of $210 a share. In reporting a gain of $36,670 on this transaction, the petitioner followed the provisions of Section 202 (a) (2) of the Revenue Act of 1921, that is to say, the basis used by the petitioner was the cost of the stock to her husband, and the gain reported was the difference between the cost to her husband and the price at which the stock was sold by the petitioner. By reason of the provisions of Section 202 (a) (2), the petitioner was required to pay $8,474.90 more in tax than she would have been required to pay if in computing gain or loss on the said sale she had been permitted to use as a basis the fair market value of the stock at the time it was acquired by her.

The Court of Claims overruled the petitioner's contentions, (1) that the proper basis for determining gain or loss on the foregoing sale was the fair market value

of the stock at the time it was acquired by the petitioner, and, (2) that Section 202 (a) (2) of the Revenue Act of 1921 was unconstitutional and void, insofar as it purported to require the petitioner to use as a basis the cost of the stock to her husband. The Court of Claims dismissed the petition, deciding as a conclusion of law that the petitioner was not entitled to recover the tax in issue, and citing as authority for such conclusion this court's decisions in *Taft* v. *Bowers* and *Greenway* v. *Bowers,* 278 U. S. 470 (R., pp. 11-13).

## Questions Presented.

1. Does that provision of Section 202 (a) (2) of the Revenue Act of 1921, which requires that in the case of a sale of property acquired by gift after December 31, 1920, the basis for determining gain or loss shall be the same as that which it would have been in the hands of the donor, apply when both the gift and the sale occurred prior to the enactment of that Act?

2. If so applied, is that provision constitutional?

## The Statute.

Act of Congress approved November 23, 1921, Chap. 136, 42 Stat. 227, 229, 237—

> "Sec. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—
>
> "(1) * * *
>
> "(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to

determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner. In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition;"

"Sec. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

"(b) Does not include the following items, which shall be exempt from taxation under this title;

"(1) * * * (2) * * *

"(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income); * * *"

## Specification of Errors.

In the view of the petitioner the Court of Claims erred in deciding as a conclusion of law that the petitioner is not entitled to recover and, in effect, holding that the issue here presented is controlled by the decision of this court in the cases of *Taft* v. *Bowers* and *Greenway* v. *Bowers,* 278 U. S. 470, notwithstanding the transactions here in question were completed prior to the enactment of the Revenue Act of 1921.

## Summary of Argument.

The language of the statute does not require that Section 202 (a) (2) be given a retrospective operation and therefore the section should not be construed to apply to transactions fully completed before the statute was enacted. *Shwab* v. *Doyle,* 258 U. S. 529.

If applied to the present case, where both the gift and the sale were fully consummated prior to the enactment of the statute, Section 202 (a) (2) is arbitrary and capricious and is invalid under the due process clause of the Fifth Amendment. *Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142; *Levy* v. *Wardell,* 258 U. S. 542.

## Argument.

This case differs from *Taft* v. *Bowers* and *Greenway* v. *Bowers,* supra, in that in the present case both the gift to the petitioner and the sale by her of the gift property occurred prior to the enactment of the Revenue Act of 1921, whereas in the *Taft* and *Greenway* cases the gifts and the sales took place after the law was passed. The questions presented here, namely, (1) whether Section

202 (a) 2 applies to a case where both the gift and sale were completed before the enactment of the law, and (2) if so whether the section is constitutional, were neither presented nor passed upon in the *Taft* and *Greenway* cases.

If the Section is to be held applicable to the present case, it must be given retrospective operation and must be held to apply to transactions fully consummated prior to its enactment. This court has repeatedly laid down the rule that a taxing statute should not be construed to apply to transactions completed before the act became law, unless that intention be clearly declared; that such a statute should not be given a retrospective operation unless its words make that imperative. *Shwab* v. *Doyle,* 258 U. S. 529; *Levy* v. *Wardell,* 258 U. S. 542. It cannot be said that the language of the Revenue Act of 1921 requires that Section 202 (a) 2 be applied to transactions which were fully completed before the Act became law. The language contains no declaration of retroactivity "clear, strong and imperative," which is the condition expressed in the decisions of this court. *Shwab* v. *Doyle, supra,* and cases there cited. On principle and on the authority of this court it is submitted that Section 202 (a) (2) should not be construed to apply to the state of facts in this case.

If the language of the Act does require that Section 202 (a) 2 be applied to the present case, where both the gift and the sale were fully consummated prior to the enactment of the statute, it is submitted that the Section is arbitrary and capricious and is invalid under the due process clause of the Fifth Amendment. *Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142; *Untermyer* v. *Anderson,* 276 U. S. 440.

The petitioner accepted the gift and sold the stock, which was the subject of the gift, prior to the enactment of the statute and consequently without knowledge of the

law. She sold the stock at a price which was equal to its fair market value at the time of the gift. Conceivably she would not have sold the stock had she known that by so doing she would be taxed for the increase which occurred in the value of the stock prior to the gift.

The petitioner in this case was not forewarned of the tax as were the petitioners in *Taft* v. *Bowers, supra* and *Greenway* v. *Bowers, supra.* She did not accept the gift with knowledge of the statute and as to the property received did not assume the position of her donor voluntarily. That position was forced upon her after she had made the sale and when it was too late for her to avoid the tax. The situation is quite the opposite from that considered in the *Taft* and *Greenway* cases where this court said:

> "By requiring the recipient of the entire increase to pay a part into the public treasury, Congress deprived her of no right and subjected her to no hardship. *She accepted the gift with knowledge of the statute and, as to the property received, voluntarily assumed the position of her donor.*" (Italics supplied.)

The situation of the petitioner, the donee, in this case is similar to that of the donor in *Blodgett* v. *Holden, supra,* concerning whom this court said:

> "It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing."

The petitioner here without forewarning of such consequence sold the stock and now is required to pay a tax on an amount which at the time received was not taxable in her hands.

The practical effect of such a tax is to reduce the value of the gift by the amount of the tax. In the case of a taxpayer subject to the highest tax rates such a tax would reduce the value of the gift by 73%. The normal tax for 1921 was 8% and the highest surtax rate was 65% (Secs. 210 and 211). In a case where the gift property cost the donor $50 and was worth $500 at the time of the gift and was sold by the donee for $500, the taxable profit to the donee under Section 202 (a) (2) would be $450 and if the donee was subject to the highest rates the tax would amount to $328.50 and the value of the gift would thus be reduced from $500 to $171.50. It is submitted that such a tax retroactively applied is arbitrary, capricious, amounts to confiscation and therefore is invalid. *Nichols* v. *Coolidge, supra.*

Until November 23, 1921, when the Income Tax Act of 1921 became law, it was the uniform rule of the Treasury Department, in determining gain upon the sale of gift property, to use as the basis *the fair market value of the property at the time of the gift.* While this rule was in force and before there was any statutory provision on the subject, the petitioner accepted the gift and sold the property for a price equal to its value at the time of the gift. She then had the official assurance of the taxing authorities that there was no tax payable by her on account of the gift. Some time later, Section 202 (a) (2) was enacted and for the first time she was then advised that by reason of the sale she incurred a tax of $8,474.90. It is too late for her to recall the sale and save the tax. If she had known of the tax she might not have changed the form of the gift property from bank stock to cash. She might have elected to hold the stock for investment, collect her dividends and wait until tax rates were reduced. But she was given no election and her situation has been changed permanently and materially to her damage by a retroactive statute. The harshness

of this result suffices to brand the statute as arbitrary, capricious and invalid in its purported application to the present case.

Since *Taft* v. *Bowers, supra* and *Greenway* v. *Bowers, supra* there can be no question but that Congress has the power to require the donee to assume the position of the donor *with respect to gifts and sales made after the enactment of the challenged statute.* In such cases the donee accepts the gift and makes the sale with knowledge of the statute and can elect to incur the tax or avoid the tax at will. But such is not this case for here all the acts which incurred the tax were fully consummated and beyond recall when the statute was enacted. Congress for the first time legislated in the 1921 Act that donees, disposing of their gifts, derive income measured by the excess of the amount received over the value in the hands of the donor when acquired, and thereby made such excess taxable income. In its practical effect this section, newly enacted, made the sale the act which incurred the tax and if retroactively applied would be as unreasonable and as confiscatory as the estate tax and the gift tax, which this court has said may not be measured by lawful transactions fully consummated and beyond recall at the time of enactment of the tax law. In its practical application to the present case the statute is arbitrary, capricious and invalid. "Taxes are very real things and statutes imposing them are estimated by practical results." *Nichols* v. *Coolidge, supra.*

The statement of this court in *Levy* v. *Wardell, supra,* may well be repeated with reference to this tax:

> "The act of Congress, therefore, should not be construed to be retroactive, and, if so construed, was in violation of the constitution of the United States in that it would take the property of the plaintiffs without due process of law in violation of the Fifth Amendment * * * ."

## Conclusion.

In conclusion and on the authority of the past decisions of this court on the subject of retroactive taxation, it is submitted (1) that Section 202 (a) (2) of the Revenue Act of 1921 does not apply to the instant case because the gift and the sale both were completed when the statute was enacted and the wording of the statute does not require that it be given retrospective operation; and (2) that when applied to the instant case the Section is arbitrary, capricious and invalid under the due process clause of the Fifth Amendment because the transactions which gave rise to the tax were fully consummated before the law was passed.

Respectfully,

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November, 1929.